Statement # 10

Agency Use of an Exceptions Process to Formulate Policy

(Adopted December 16, 1983)

The Administrative Conference commissioned a study[1] of the Department of Energy's petroleum allocation and entitlements program as administered through an "exceptions" process by the Office of Hearings and Appeals. The program covered by the study applied to the petroleum industry from 1973 to 1981, a period characterized by rapidly changing conditions in the industry and several periods of emergency.

The Conference believes that the experiences of this particular "exceptions" process, while unique to this program in important respects, are worth sharing with the Congress and with those agencies that may administer a regulatory program—especially in the context of an emergency—in which individuals or classes seek waivers, exemptions, variances, or other particularized exceptions to rules of general applicability.[2]

The Regulatory Framework

The petroleum industry began to come under comprehensive federal regulation in 1970 with the advent of anti-inflation controls. In the Emergency Petroleum Allocation Act of 1973 Congress mandated a program of price and allocation controls to be administered by an energy agency, ultimately the Department of Energy (DOE).

Under this program, the energy agency issued rules prescribing distributional patterns and prices for petroleum products among producers, refiners, distributors, and end users. To deal with inequities created by the regulatory program, a "safety valve" process was established to grant exceptions in cases where individual firms suffered disproportionately. The exceptions office, ultimately called the Office of Hearings and Appeals (OHA), quickly

[1] "When the Exception Becomes the Rule: Regulatory Equity, the Exceptions Process and the Formulation of Energy Policy" by Peter H. Schuck (1983). While not endorsing every statement and conclusion expressed in the report, the Conference commends the report for its value in examining a significant exceptions program during periods of difficulty.

[2] The Conference expresses its views here in a "statement" rather than the more forceful "recommendation" format because the program that was studied in detail is currently winding down, and because the data compiled on the exceptions processes of other agencies is not sufficient to support a recommendation of universal applicability.

became an important locus of power within DOE. OHA was kept separate and autonomous from the Economic Regulatory Administration (ERA), the rulemaking and enforcement arm of the Department.

The Office of Hearings and Appeals had the authority to issue exceptions to regulations, special redress orders, modification and recision orders, and stays of pending orders. OHA could order any firm to sell or to buy crude oil or refined products from any other firm in the industry under terms prescribed by OHA. These powers were exercised subject to the approval of a Departmental administrative review committee, and, if consensus was not reached, to the possibility of Secretarial review. The process was heavily influenced by OHA's leverage and expertise.

Achievements and Problems

Four detailed case studies were made of the operation of OHA: the subsidization of small refiners during 1974-1981, the handling of disparities caused by the Iranian oil embargo in 1979, the pricing of Alaska crude oil, and the motor gasoline crisis of 1979. Each of these cases has its own peculiar context and history; as a whole they defy easy summarization. It seems undeniable, however, that as energy regulation became increasingly controversial in the 1970's, DOE policymakers—on matters of considerable importance—often deferred to the judgment and actions of OHA.

That office gradually was transformed from a mere safety valve dispensing equitable exceptions to individual firms caught up in over-broad rules into an important policymaking body within DOE, designing many of the substantive specifications for the very regulatory system whose pressures OHA was supposed to relieve.

OHA's achievements during the period of controls were impressive. OHA was able to process a large caseload and to decide important cases quickly. OHA decisions were generally regarded as being of high professional and intellectual quality. OHA was able to provide immediate relief when it appeared that delay would be tantamount to denial.

Nevertheless, problems began to crop up, especially as procedures designed for emergency relief became instruments for broad gauged policymaking.

Indeterminate equitable standards. Energy legislation has always prescribed three standards: relief must be necessary to prevent "special hardship," "inequity," or "unfair distribution of burdens." OHA elaborated these extremely ambiguous standards on a case-by-

case basis; OHA's published guidelines sometimes provided little assistance as to the meanings of the standards.

Informal procedures. Neither the DOE Act nor the Administrative Procedure Act prescribes OHA's procedures in exceptions cases. The procedures devised by OHA were highly informal, combining elements of notice-and-comment rulemaking with an opportunity for a relatively summary adjudicative hearing. The courts were highly deferential to OHA's choice of procedures, citing the "emergency" nature of the program, even during periods when no actual emergency existed. The flexibility and informality that permitted expedition also occasioned criticism from regulatory participants who complained about lack of sufficient notice, and about inadequate procedures for discovery, hearings, and review and also made claims of unfair ex parte communications and combination of functions.

The "safety valve" mentality. By all accounts, DOE's rulemaking arm, the ERA, on many occasions deferred to OHA on fundamental policy problems that ought to have been confronted and resolved through a legislative-type process. Despite OHA's efforts to open its significant proceedings to public comment and to broaden the policy focus of the proceedings, the case-by-case exceptions procedure was not well-suited to development of sound policy and generally applicable rules. By its nature an exceptions process tends to examine anomalies and emergencies rather than typical situations. OHA's analytical focus was on hardships of individual firms rather than upon the effects that particular decisions could have on the industry as a whole or on consumers generally.

Interim relief. OHA often found it necessary to provide expedited relief to applicants after only a summary hearing and before issuing a proposed final decision for public comment. Relief was undoubtedly sometimes necessary to prevent irreparable harm due to delay, but reliance on interim decisions by those in the market led to adjustments and created new equities that made retractions difficult and possibly unjust.

Lessons

It is difficult fully and fairly to evaluate OHA's performance and the role of the exceptions process without taking into consideration two crucial factors: the comparative weakness of the DOE rulemaking process and the enormous problems associated with any program designed to regulate the entire petroleum industry. Nor are the insights gleaned in this study necessarily transferable to other programs in other agencies. Because many of the issues raised by DOE's exceptions process are endemic to broad regulatory programs, however,

the Conference offers, to the extent they may be helpful, the following suggestions as an aid to congressional oversight and agency self-evaluation.

1. Excessive use of exceptions. Agencies should guard against the temptation to avoid necessary rulemaking, including the reconsideration of existing rules, through excessive reliance upon an exceptions process.

2. Emergency programs. Where an exceptions process begins as part of an emergency program, consideration should periodically be given to whether the emergency is continuing. Abbreviated agency procedures and extraordinarily deferential judicial review—which may be appropriate for an emergency—should be replaced by conventional agency and judicial standards of conduct when the emergency is over.

3. Equitable criteria. In some circumstances, explicit congressional prescription of the equitable or other criteria that shall govern an exceptions process would be helpful. Agencies should consider the issuance of regulations further defining those criteria and prescribing the procedures to be used in exceptions proceedings.

4. Procedures tailored to equities. Procedures governing exceptions cases should reflect the need for particularized regulatory equity in the applicable program. The procedures provided for relatively routine "hardship" applications and for those cases of broader policy significance should differ to take account of the differing demands for information, fairness, and legitimacy. To the extent feasible in light of the need for speedy action, adequate notice of an application for exceptions relief should be given to all interested members of the public, and relief should be granted or denied only after an opportunity for full development of the relevant factual and policy issues.

5. Emergency relief. Where an exceptions program allows for emergency, interim relief, an agency should consider the inclusion of suitable mechanisms—such as an escrow fund, interest obligation, or expiration date for interim orders—to restore the *status quo ante* insofar as possible in the event that such relief is subsequently determined to be inappropriate.

6. Exceptions tribunal. The form and independence of the tribunal that is to decide exceptions cases should depend chiefly upon the policy significance of the exceptions decision and the value of exceptions relief to applicants. The greater the precedential and policy significance of an exceptions decision, the more closely the tribunal should be integrated into the policy-sensitive and politically-accountable decision processes of the agency. The more the

exceptions decision is routine, without precedential significance, and purely equitable or "hardship" in nature, the more readily it may be delegated to decision processes that are more autonomous and adjudicatory in character.

7. Significant cases. If an exceptions tribunal decides a case with broad policy significance, the proceeding should be conducted much as a rulemaking with broadened participation in the exceptions adjudication and with an opportunity for public comments on all significant policy, factual, and remedial issues in the case.

Citations

48 FR 57464 (December 30, 1983)

__ FR _____ (2013)

1983 ACUS 379